STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LAWRENCE LATIMER,

Defendant-Appellant.

UNPUBLISHED
March 28, 2000

No. 212172
Oakland Circuit Court
LC No. 97-155535-FC

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first claims that he was denied a fair trial and his constitutionally guaranteed right of confrontation by the trial court's restrictions on his cross-examination of three prosecution witnesses. We disagree. Defendant has not shown a violation of his rights under the Confrontation Clause, which protects a defendant's right for a reasonable opportunity to test the truthfulness of a witness' testimony. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Further, giving due regard to our de novo review of preliminary questions of law affecting the admissibility of evidence, we are not persuaded that the trial court's evidentiary rulings were an abuse of discretion under the Michigan Rules of Evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The trial court's limitation on the cross-examination of witness Richardson regarding his prior testimony, in the face of defendant's proffered use of the evidence under MRE 608(b) and MRE 404(b), was not an abuse of discretion. MRE 608(b) provides a trial court discretion to allow inquiry into specific instances of conduct of a witness concerning his character for truthfulness or untruthfulness, but does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters relating only to credibility. The trial court's discretion under MRE 608(b) is also subject to MRE 403, which permits a trial court to exclude relevant evidence if "its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" *People v Brownridge,* 459 Mich 456, 464; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999).

We agree with defendant that evidence that Richardson gave false prior testimony under oath would be probative of his character for truthfulness. However, an inquiry on cross-examination into whether Richardson made certain statements under oath at his 1992 federal trial on marijuana-related charges and 1997 preliminary examination in this case would not, by itself, establish by inference the relevant fact, namely, a false statement under oath, because there was no testimony elicited at the 1997 preliminary examination that Richardson's statements pertained to the same incident underlying the 1992 trial. Moreover, even if the statements did pertain to the same incident and could be viewed as inconsistent, this would not necessarily indicate that Richardson's statements at his 1992 trial were the false statements. Defendant would be stuck with any answer that Richardson provided because MRE 608(b) does not allow extrinsic evidence of the specific acts. *People v Lester,* 232 Mich App 262, 276; 591 NW2d 267 (1998).

In any event, the trial court's ruling to limit the cross-examination of Richardson reflects that the court applied MRE 403, finding that the proffered evidence was not particularly probative because it did not reflect bias or a tendency on the part of Richardson to make false accusations and that the court weighed the probative value of the evidence against the prejudicial effect of adding "a level of complexity to the jury's task." We are not persuaded that the trial court abused its discretion in applying MRE 403. *Brownridge, supra*.

We reject defendant's claim that he presented a proper foundation for cross-examining Richardson about his prior testimony under MRE 404(b). Unlike MRE 608(b), which is concerned with a witness' character for truthfulness or untruthfulness, MRE 404(b) requires evidence relevant to a noncharacter theory. *People v Starr,* 457 Mich 490, 496; 577 NW2d 673 (1998). Defendant's offer to show a plan, system, or scheme on the part of Richardson to avoid criminal responsibility by falsely claiming to be an innocent bystander failed to satisfy any of the standards for admission under MRE 404(b). *Starr, supra* at 496; *Ho, supra* at 185. The commonality between Richardson's alleged prior act and defendant's trial was drugs. However, Richardson did not claim to be an innocent bystander in the instant case, with no knowledge of or involvement in drug transactions. Further, given defendant's admission that he killed the victim (albeit in self-defense), the fact of consequence at defendant's trial concerning Richardson's testimony was whether Richardson gave truthful testimony regarding his eyewitness observations of the shooting (e.g., that the victim did not have a gun). Even if defendant could have shown that Richardson gave false testimony at his 1992 trial, that act is not logically linked to the ultimate inference sought by defendant about Richardson lying at trial about the killing. At best, the proposed evidence was shown to have a bearing on Richardson's character for truthfulness. Hence, the trial court did not abuse its discretion in excluding the evidence on the proffered innocent bystander theory. *People v Crawford,* 458 Mich 376, 390; 582 NW2d 785 (1998).

Furthermore, even if the trial court abused its discretion, as previously stated, defendant was afforded a reasonable opportunity to test the truthfulness of Richardson's credibility. In this regard, we note that the jury had ample evidence of other prior statements made by Richardson to evaluate his

credibility. Although not made under oath, the statements were related to the instant case. Specifically, Richardson testified that he had lied or withheld information in this case about drug transactions, when first interviewed by detectives, because he did not want to be implicated in drug charges. Given this record, we are not persuaded that defendant's substantial rights were affected by the limitation placed on the cross-examination by the trial court. MRE 103(d). See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

With regard to the two witnesses, Heath and Dumas, who testified about statements made to them by defendant about the killing, we are likewise not persuaded that the trial court abused its discretion in limiting the scope of cross-examination on matters affecting their character for truthfulness or untruthfulness. MRE 609(b); MRE 403; *Brownridge, supra.* See also *People v Fuzi #1*, 116 Mich App 246; 323 NW2d 354 (1982). Further, defendant has not established an abuse of discretion relative to any proffered noncharacter purpose of the cross-examination by his trial attorney, such as bias or motive, for either witness. *Lukity, supra* at 488. We reject defendant's claim that his trial attorney should have been allowed to cross-examine Dumas regarding his recidivist criminal behavior to show that "helping the Prosecutor's office is like money in the bank" to Dumas because he was likely to be back in the criminal system. Defendant's trial attorney was given a reasonable opportunity to cross-examine Dumas about offenses for which he was incarcerated at the time defendant made the statements to him, his status at the time of defendant's trial, whether he expected anything from the prosecutor's office, and his future expectations about being back in the court system. Even if Dumas would have admitted to the recidivist criminal behavior during cross-examination, the proposed use of this testimony to predict his likelihood for future criminal conduct would have run afoul of the prohibition against the use of evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. MRE 404(b). Although such evidence may be admissible for a noncharacter purpose, defendant did not weave a logical thread between Dumas' prior acts (various prosecutions) and the ultimate inference sought (Dumas' interest in testifying against defendant). *Crawford, supra* at 390. Thus, the trial court's limitation of the cross-examination of Dumas relative to this theory was not error.

Defendant next claims that the trial court erred in denying his requested instructions based on CJI2d 5.5 and 5.6, and a separate informant instruction. We disagree. Defendant's claim that CJI2d 5.5 and 5.6 were justified because of evidence that Richardson was involved in the murder is not properly before us, given that trial counsel conceded at trial that Richardson was not implicated in the murder. A "defendant may not allow an error to pass in the trial court, or request an action that may constitute error, and subsequently seek redress in this Court." *People v Buck*, 197 Mich App 404, 423; 496 NW2d 321 (1992), modified 444 Mich 853 (1993). In any event, an unmodified version of CJI2d 5.5 would not have been proper because there was no evidence that Richardson knowingly and willingly helped or cooperated in the killing. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). Under the standard jury instruction, Richardson must have been an accomplice for the crime for which defendant was charged. *Ho, supra* at 189.

Further, while trial judges are not required to use standard criminal jury instructions, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), defendant has not shown that the modified

version of CJI2d 5.5 or the requested informant instruction was necessary to protect his rights and fairly present the credibility issues to the jury. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). The rationale for a cautionary instruction on "accomplice" testimony is that such testimony, when presented by the prosecution, is inherently weak. *People v Reed*, 453 Mich 685, 691; 556 NW2d 858 (1996). The problems with such testimony are that (1) actual or implied threats or promises of leniency by the prosecution often induce an accomplice to fabricate testimony, and (2) a jury may rely on otherwise incredible accomplice testimony simply because it is presented by the prosecution. *Reed, supra* at 692. A trial court should ordinarily give the instruction when requested, but there is no rule of automatic reversal, even in a closely drawn case. *Reed, supra* at 692. "Closely drawn" has been construed as involving cases where the trial is a credibility contest between the defendant and an accomplice. *Buck, supra* at 415.

In the case at bar, an accomplice instruction modified to include criminal activities other than the crime for which defendant was tried, as requested by trial counsel, might have confused the jury. *Ho, supra* at 189. Further, while Richardson was a prosecution witness, the difficulty with his credibility was plainly apparent from the testimony elicited regarding his prior statements made to avoid being implicated in drug activities. *Reed, supra* at 693. The jury was instructed to consider prior inconsistent statements to evaluate credibility, as well as any interest, bias, or personal interest in the case, or special reason to lie. Moreover, this was not a closely drawn case because it did not involve a credibility contest between Richardson and defendant. The jury had other proofs, including the jail inmates' testimony about defendant's statements and the medical examiner's testimony about the range from which the gunshot was fired, to determine if the prosecution sufficiently proved a premeditated and deliberate killing in the face of defendant's claim of self-defense. Examined in this context, we conclude that the trial court's refusal to give the requested instructions was not error. *Bartlett, supra*.

Finally, defendant claims that the trial court erred by not giving a requested instruction on imperfect self-defense. We find it unnecessary to decide this issue because defendant was found guilty of first-degree murder. Imperfect self-defense is a qualified defense for reducing second-degree murder to voluntary manslaughter. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). In passing, we note that the trial court correctly followed Michigan law when holding that the requested instruction was improper. Imperfect self-defense is limited to circumstances where a defendant would have had a right to lawful self-defense but for his actions as the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry W. Saad